U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 16211241

Date: JUN. 16, 2021

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Advanced Degree Professional

The Petitioner, a software development and consulting business, seeks to employ the Beneficiary as a systems analyst under the second-preference, immigrant classification for members of the professions with advanced degrees or their equivalents. Immigration and Nationality Act (the Act) section 203(b)(2)(A), 8 U.S.C. § 1153(b)(2)(A).

After the filing's initial grant, the Director of the Texas Service Center revoked the petition's approval. The Director concluded that the Petitioner did not establish that a *bona fide* job opportunity existed. Specifically, the Director found that the Petitioner did not adequately notify the U.S. Department of Labor (DOL) and potentially qualified U.S. workers of its multiple work locations or need for travel to perform the job duties. The matter is now before us on the Beneficiary's appeal.

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit by a preponderance of the evidence. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010). The AAO reviews the questions in this matter *de novo*. *See Matter of Christo's Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon *de novo* review, we will remand the matter for the entry of a new decision consistent with the foregoing analysis.

I. THE BENEFICIARY AS AN AFFECTED PARTY

Beneficiaries generally cannot file appeals or motions in visa petition proceedings. *See* 8 C.F.R. § 103.3(a)(1)(iii)(B) (excluding a beneficiary of a visa petition as an "affected party"). U.S. Citizenship and Immigration Services (USCIS), however, treats beneficiaries as affected parties if they are eligible to "port" under section 204(j) of the Act, 8 U.S.C. § 1154(j), and properly request to do so. *See Matter of V-S-G- Inc.*, Adopted Decision 2017-06, *14 (AAO Nov. 11, 2017). "A beneficiary's request to port is 'proper' when USCIS has evaluated the request and determined that the beneficiary is indeed eligible to port prior to the issuance of a NOIR [notice of intent to revoke] or NOR [notice of revocation]." USCIS Policy Memorandum PM 602-0152, *Guidance on Notice to, and Standing for, AC 21 Beneficiaries about I-140 Approvals Being Revoked After Matter of V-S-G- Inc.* 5 (Nov. 11, 2017), https://www.uscis.gov/legal-resources/policy-memoranda. Thus, a beneficiary becomes an "affected party" with legal standing in a revocation proceeding when USCIS makes a favorable determination that the beneficiary is eligible to port. *Id.*

In this case, the Beneficiary filed Form I-485 Supplement J, Request for Job Portability Under INA Section 204(j), on July 6, 2020, before the Director's NOR dated September 8, 2020. The Director issued the NOIR to both the Petitioner and the Beneficiary, and considered evidence submitted by both parties. In his decision, the Director states, "The beneficiary was found to be eligible to receive notices, and therefore, was granted the opportunity to respond in revocation proceedings, ... in accordance with the findings in the adopted decision in *Matter of V-S-G-, Inc.* ..." Therefore, the Beneficiary is considered an affected party in these revocation proceedings.

II. EMPLOYMENT-BASED IMMIGRATION

Immigration as an advanced degree professional generally follows a three-step process. To permanently fill a position in the United States with a foreign worker, a prospective employer must first obtain certification from the DOL. *See* section 212(a)(5) of the Act, 8 U.S.C. § 1182(a)(5). DOL approval signifies that insufficient U.S. workers are able, willing, qualified, and available for a position. *Id.* Labor certification also indicates that the employment of a foreign national will not harm wages and working conditions of U.S. workers with similar jobs. *Id.*

If DOL approves a position, an employer must next submit the certified labor application with an immigrant visa petition to U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. Among other things, USCIS considers whether a beneficiary meets the requirements of a certified position and a requested immigrant visa classification. If USCIS approves the petition, a foreign national may finally apply for an immigrant visa abroad or, if eligible, adjustment of status in the United States. *See* section 245 of the Act, 8 U.S.C. § 1255.

At any time before a beneficiary obtains lawful permanent residence, however, USCIS may revoke a petition's approval for "good and sufficient cause." Section 205 of the Act, 8 U.S.C. § 1155. If supported by the record, a petition's erroneous approval may justify its revocation. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988).

USCIS may issue a notice of intent to revoke (NOIR) if the unrebutted and unexplained record, as of the NOIR's issuance, would have warranted the petition's denial. *Matter of Estime*, 19 I&N Dec. 450, 451 (BIA 1987). Similarly, USCIS may revoke a petition's approval if a petitioner's response does not overcome the grounds stated in an NOIR. *Id.* at 452.

III. ANALYSIS

The underlying labor certification for the offered position of systems analyst was filed with DOL on April 9, 2010.[1] DOL's regulations require an employer to give notice of the filing of the application for permanent employment certification,[2] to conduct required pre-filing recruitment including placing a job order with the State Workforce Agency and advertisements,[3] and to prepare a recruitment report[4] as part of a pre-filing recruitment effort. In filing the labor certification, the Petitioner attested that the job opportunity was clearly open to any U.S. worker, that it conducted its recruitment for able,

[1] The priority date of a petition is the date DOL accepted the labor certification for processing. *See* 8 C.F.R. § 204.5(d).
[2] 20 C.F.R. § 656.10(d).
[3] 20 C.F.R. §§ 656.17(e), (f).
[4] 20 C.F.R. § 656.17(g).

willing, qualified, and available U.S. workers from December 2009 to March 2010, and that the U.S. workers who applied for the job opportunity were rejected for lawful job-related reasons.

Following the labor certification's approval, the Petitioner timely filed an immigrant petition with the labor certification seeking to employ the Beneficiary as a systems analyst. That immigrant petition was approved on April 12, 2011. On the petition, the Petitioner listed the work location as its address in [redacted] Texas.

Following the approval of that petition, the Director notified the Petitioner of derogatory information that called into question whether it adequately notified potentially qualified U.S. workers that the offered position required travel to multiple work locations. The Director noted that, in a separate application, the Beneficiary provided his address history, claiming to reside in multiple locations outside of the commuting distance to [redacted] Texas during a period of time they also claimed to be employed with the Petitioner. The Director also noted that the record did not include employment contracts between the Petitioner and the Beneficiary, or service agreements between the Petitioner and its clients. In the NOIR, the Director requested evidence to establish that a *bona fide* job opportunity exists, including copies of contracts under which the Beneficiary will be employed and copies of the recruitment conducted in support of the underlying labor certification.

In response to the NOIR, the Petitioner stated that on the ETA Form 9089, Application for Permanent Employment Certification, in Section H, Primary Worksite, it listed "other locations" in addition to its address in [redacted] TX. It noted that records associated with labor certifications need only be retained for a period of five years from the date of filing, pursuant 20 C.F.R. § 656.10(f), and that it was unable to obtain the recruitment documents prepared in support of the underlying labor certification filed more than 10 years earlier. However, it did provide copies of newspaper advertisements that it claimed were part of the pre-filing recruitment for similar positions in 2014 and 2019. The advertisements provided state, "Primary work location is [redacted] TX but relocation possible."

The Petitioner also submitted service agreements with some of its clients from 2006 to 2020, and copies Internal Revenue Service Forms W-2, Wage and Tax Statements, it issued to the Beneficiary from 2009 to 2014, demonstrating that it paid the Beneficiary at least the proffered wage each year.[5]

The Director revoked the petition's approval. He noted that the advertisements and service agreements the Petitioner provided could not be directly connected to the Beneficiary's employment or the labor certification filed on his behalf. He concluded that the record did not include "evidence to show that the Petitioner's recruitment for the offered position occurred, that it complied with the requirements for the recruitment process, that it afforded qualified and available U.S. workers a fair opportunity to qualify for the job, it informed those qualified and available U.S. workers that travel was required for the job, and it notified the Department of Labor that the Beneficiary would be employed at multiple locations throughout the U.S."

[5] The record demonstrates that the Beneficiary left the Petitioner's employment in 2014, but that the Petitioner continues to offer the labor certification position to the Beneficiary. The Petitioner has filed a subsequent immigrant petition in this matter based on the same underlying labor certification and under the professional category, which has been approved.

On Form I-290B, Notice of Appeal of Motion, the Beneficiary indicates that they will submit a brief and/or additional evidence within 30 calendar days. However, as of this date, we have not received a brief or any additional evidence. As required in Part 3 of the Form I-290B, the Beneficiary states that the Director failed to properly consider the evidence in the record and misconstrued evidence without consideration of the legal requirements. Because the Beneficiary identifies erroneous conclusions of law and statements of fact in its statement regarding the basis for the appeal, we will consider the Beneficiary's statement in lieu of a brief or additional evidence. *See* 8 C.F.R. § 103.3(a)(1)(v); *see also* 8 C.F.R. § 103.2(a)(1) (incorporating each U.S. Citizenship and Immigration Services' form instructions into the regulations requiring its submission).

A petitioner must establish eligibility for a requested benefit as of a petition's filing and continuing throughout its adjudication. 8 C.F.R. § 103.2(b)(1). The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a labor certification establishes a priority date for any immigrant petition later, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977). *See also* 8 C.F.R. § 204.5(g)(2).

Here, the Director issued the NOIR because the Petitioner did not submit evidence of its recruitment for the offered position or its employment contracts and service agreements. However, this evidence is not listed in the regulations as required initial evidence for this petition. *See* 8 C.F.R. § 204.5(k)(3)-(4). Further, the Director's request for this evidence in the NOIR was nearly 10 years after the petition was filed, and four years after the DOL's required retention period for recruitment documents as listed in 20 C.F.R. § 656.10(f).

In light of the unavailability of the recruitment documents, the Petitioner provided comparable secondary evidence to support that potentially qualified workers were notified of the travel requirements and multiple work locations for the offered position. The Director did not properly consider this evidence, nor does he address at all the Petitioner's evidence that it did, in fact, list "other locations" on the Form 9089.

With regard to the service agreements that the Petitioner provided, the Director's consideration of this evidence focused solely on the fact that the agreements did not relate to specific work performed by the Beneficiary. However, the petition represents future employment, offered to the Beneficiary upon approval of lawful permanent residence. There is no requirement that the Beneficiary must have held the offered position at the time the labor certification was filed, or even that the Beneficiary be continuously employed with the Petitioner from the time of filing until obtaining lawful permanent residence. The Petitioner provided evidence to demonstrate it had service agreements with clients from the priority date onward. The Director did not fully consider these service agreements, even if unrelated to the Beneficiary's specific work, in determining whether a *bona fide* job opportunity exists.

The Director's decision to revoke the petition's approval is deficient, as it does not sufficiently explain the reasons for revocation after considering the evidence in the record. When revoking approval of a petition, a director has an affirmative duty to explain the specific reasons for the revocation; this duty includes informing a petitioner why the evidence did not satisfy its burden of proof pursuant to section 291 of the Act. *See* 8 C.F.R. § 103.3(a)(1)(i). The Director's decision in this case does not explain

why the information provided in response to the NOIR was insufficient or how it failed to satisfy its burden of proof regarding eligibility for the benefit sought.

Considering the above discussed deficiencies, we are withdrawing the Director's revocation and remanding the petition to allow the Petitioner an opportunity to address the additional deficiencies identified above. On remand, the Director may wish to issue a new NOIR, and allow the Petitioner an opportunity to respond. The Director must state how the record fails to demonstrate eligibility for the classification sought under the pertinent regulatory scheme. If the Director makes a finding of willful material misrepresentation against either the Petitioner, the Beneficiary, or both, the Director must articulate the basis for the finding(s) in accordance with the above-referenced case law.

IV. CONCLUSION

For the reasons discussed above, we will remand this case to the Director for further consideration.

If the Director issues a new NOIR, the content of that notice and the consideration of any evidence submitted by the Petitioner should comply with the requirements of 8 C.F.R. § 205.2(b) and (c) and *Matter of Estime*. The Director shall then issue a new decision.

ORDER: The decision of the Director is withdrawn. The matter is remanded for the entry of a new decision consistent with the foregoing analysis.